PUBLIC PROSECUTOR

v.

LAWRENCE TAN HUI SENG

SUPREME COURT, KUALA LUMPUR
TUN DATO' SERI ABDUL HAMID BIN OMAR LP,
TAN SRI DATUK GUNN CHIT TUAN CJ (MALAYA),
TAN SRI DATUK EDGAR JOSEPH JR. SCJ
[CRIMINAL REFERENCE NO: 06-8-90]
4 AUGUST 1993

CRIMINAL LAW: Charge under s. 409 Penal Code - Criminal breach of trust - Appeal against discharge and acquittal - Whether appellate Court entitled to interfere - Whether questions of law of public interest had arisen in the course of the appeal - Appellate Courts determination of the questions of law.

The respondent was prosecuted on two counts of criminal breach of trust in contravention of s. 409 of the Penal Code. The respondent was acquitted and discharged by the trial Court and on appeal, the High Court upheld the acquittal on substantially the same grounds as that advanced by the trial Court.

The appellant successfully applied to the Supreme Court for leave to refer certain questions, said to be questions of law of public interest, for determination, whichhad arisen in the course of the appeal and the determination of which by the High Court, had affected the event of the appeal.

At the hearing of the appeal, the Supreme Court treated the reference as a re-hearing of the appeal and reviewed the entire evidence.

Held:

[1] The conclusions of both the Courts below revolved around issues of fact depending on the credibility of the respondent, as to which there were concurrent findings of fact in his favour. In the event the Court was not persuaded that both those Courts were not entitled to arrive at the conclusion that the respondent had succeeded in raising a reasonable doubt as to the truth of the case for the prosecution or as to his guilt, in respect of both the charges.

[2] Therefore the questions posed by this reference were not questions of law within the meaning of s. 66(1) of the Courts of Judicature Act 1964 (the Act) in that they were not questions of

law of public interest which had arisen in the course of the appeal the determination of which had affected the event of the appeal.

[3] In principle the Court could not answer the questions posed by the reference as it had no jurisdiction to do so and the orders of acquittal and discharge must be allowed to stand. The Court would nevertheless answer the questions posed in the event that they were in fact questions of law within the meaning of s. 66(1) of the Act.

Per curiam:

[1] On the question whether the element of "dishonesty" for the offence of criminal breach of trust under the Penal Code is in law proved when an Advocate and Solicitor takes a certain sum of money from the Client's Account of the Firm for the use of the Firm, without authority of the client, the answer would depend on the particular circumstances of the case including the explanation of the accused and whether or not it is accepted.

[2] On whether it would make any difference if the money was taken with the intention of replacing the sum taken as soon as the Firm was able to do so; if the essential elements of the offence of criminal breach of trust have been made out, the fact that at the time of the offence the accused had intended to make restitution, as soon as possible, could not in law constitute a defence.

[3] On whether it is criminal breach of trust under the Penal Code when an employer having deducted his employee's contribution in accordance with the Employees Provident Fund Act 1951, fails to remit the same to the Fund and such failure is due to the Firm not having the money to do so, it having used the money, s. 405 of the Penal Code requires actual and not just fictional entrustment and since once an employer deducts the employee's contribution to the Provident Fund from his wages, such an employee can exercise no control over the sum of money thus deducted nor can he exercise any rights of ownership over the same simply because he no longer is the owner of the same, the deduction by an employer from the wages of an employee pursuant to the provisions of the EPF Act does not amount to entrustment under s. 405 of the Penal Code.

[Appeal dismissed. Orders of acquittal and discharge affirmed].

[**Bahasa Malaysia** Translation of Headnote]

UNDANG-UNDANG JEN AYAH: Tuduhan di bawah s. 409 Kanun Keseksaan - Jenayah pecah amanah - Rayuan terhadap pelepasan dan pembebasan - Sama ada Mahkamah rayuan berhak untuk mencelah - Santa ada persoalan, undang-undang mengenai kepentingan awam telah timbul dalam rayuan - Keputusan Mahkamah rayuan mengenai persoalan undang-undang.

Responden telah didakwa atas dua tuduhan jenayah pecah amanah bertentangan dengan s. 409 Kanun Keseksaan. Responden telah dilepaskan dan dibebaskan oleh Mahkamah perbicaraan dan atas rayuan, Mahkamah Tinggi telah mengekalkan pembebasan tersebut secara substansial atas alasan-alasan yang dikemukakan oleh Mahkamah perbicaraan.

Perayu telah berjaya memohon kepada Mahkamah Agung untuk kebenaran bagi merujuk beberapa persoalan, yang dikatakan sebagai persoalan undang-undang mengenai kepentingan awam, untuk diputuskan, yang telah timbul dalam rayuah berkenaan dan keputusannya oleh Mahkamah Tinggi telah menjejaskan rayuan tersebut.

Diperbicaraan rayuan tersebut, Mahkamah Agung telah menyifatkan rujukan berkenaan sebagai pembicaraan semula rayuan tersebut dan menyemak keseluruhan keterangan.

Diputuskan:

[1] Kesimpulan kedua-dua Mahkamah di bawah berkisar sekitar isu fakta yang bergantung atas kebolehpercayaan responden, di mana terdapat kedapatan fakta yang sama yang memihak kepadanya. Jika Mahkamah tidak diyakinkan bahawa kedua-dua Mahkamah tersebut tidak berhak untuk mencapai kesimpulan bahawa responden telah berjaya menimbulkan keraguan yang munasabah mengenai kebenaran kes bagi pendakwaan atau mengenai kebersalahannya, berhubung dengan kedua-dua tuduhan tersebut.

[2] Oleh yang demikian persoalan yang dikemukakan oleh rujukan ini bukanlah merupakan persoalan undang-undang dalam lingkungan maksud s. 66(1) Akta Mahkamah Kehakiman 1964 (Akta tersebut) dimana ia bukanlah merupakan persoalan undang-undang mengenai kepentingan awam yang telah timbul dalam rayuan berkenaan dimana keputusannya telah menjejaskan rayuan berkenaan.

[3] Pada prinsipnya Mahkamah tidak dapat menjawab persoalan yang dikemukakan oleh rujukan tersebut kerana ia tidak mempunyai sebarang bidangkuasa untuk berbuat sedemikian dan perintah pelepasan dan pembebasan mestilah dibenarkan untuk kekal. Walau bagaimanapun Mahkamah akan menjawab persoalan-persoalan yang dikemukakan jika ia adalah sebenarnya merupakan persoalan undang-undang dalam lingkungan maksud s. 66(1) Akta tersebut.

Per Curiam:

[1] Atas persoalan sama ada unsur "tidak jujur (dishonesty)" bagi kesalahan jenayah pecah amanah di bawah Kanun Keseksaan, adalah dibuktikan di bawah undang-undang apabila seorang Peguambela dan Peguamcara mengambil sejumlah wang daripada Akaun Klien firmanya untuk kegunaan firma tersebut, tanpa kebenaran klien berkenaan, maka jawapannya akan bergantung ke atas keadaan-keadaan yang tertentu akan kes tersebut termasuklah penerangan oleh sitertuduh dan sama ada atau tidak ia diterima.

[2] Atas sama ada akan terdapat apa-apa perbezaan jika wang diambil dengan niat untuk menggantikan jumlah yang diambil sebaik sahaja Firma tersebut berupaya untuk melakukannya, jika unsur-unsur penting akan kesalahan jenayah pecah amanah telah dibuat, fakta bahawa pada waktu kesalahan tersebut sitertuduh telah berniat untuk mengembalikannya semula, secepat yang mungkin, tidak boleh dari segi undang-undang menjadi suatu pembelaan.

[3] Sama ada ianya merupakan jenayah pecah amanah di bawah Kanun Keseksaan apabila seseorang majikan itu setelah memotong caruman pekerjanya menurut Akta Kumpulan SimpananPekerja 1951, gagal mengirimkannya kepada Kumpulan tersebut dan kegagalan sedemikian adalah akibat Firma tersebut tidak mempunyai wang untuk berbuat sedemikian, dan ia telah menggunakan wang tersebut, s.405 KanunKeseksaanmenghendaki amanah yang sebenar bukannya yang direka-reka dan apabila majikan memotong caruman pekerja daripada gajinya untuk Kumpulan Simpanan, pekerja tersebut tidak boleh mengambil sebarang kawalan ke atas jumlah wang tersebut yang telah dipotong dan juga tidak boleh mengambil sebarang hak ke atas wang tersebut, potongan oleh majikan daripada gaji pekerja menurut peruntukan Akta KWSP tidak membawa kepada pengamanahan di bawah s. 405 Kanun Keseksaan.

[Rayuan ditolak. Perintah pelepasan dan pembebasan disahkan].

Cases referred to:

Yue Sang Cheong Sdn. Bhd. v. Public Prosecutor [1973] 2 MLJ 77 ***(foll)***

Velji Raghavji Patel v. State of Maharashtra AIR [1965] SC 1433 ***(refd)***

State of Gujarat v. Jaswantlal AIR [1968] SC 700 at 701 ***(refd)***

Nathmull Poddar v. Salil Kumar Chakraborty [1971] Cr. LJ 361 ***(refd)***

Ahmed Randan v. Smt. Gertie Mathias [1977] Cr. LJ 309,310 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 66(1)
Employees' Provident Fund Act 1951
Penal Code, ss. 405,406,409
Penal Code, s. 405 (India)

Other sources referred to:

Penal Law of India, Sir Hari Singh Gour, 10th Edn., p. 3498

For the applicant - Stanley Isaacs, A.G.'s Chambers
For the respondent - Radzi Sheik Ahmad; M/s. Radzi Sheikh Ahmad & Co.

JUDGMENT

Edgar Joseph Jr. SCJ:

The respondent, Lawrence Tan Hui Seng, an Advocate and Solicitor, was prosecuted in the Sessions Court, Kuala Lumpur, on two counts of criminal breach of trust in contravention of s. 409 of the Penal Code; the counts being in the following terms:

First Charge (Amended):

> That you on 30 June 1987 at the premises of M/s Abdul Malik and Lawrence Tan, 24th Floor, UMBC Building, Jalan Sultan Sulaiman, in the Federal Territory of Kuala Lumpur, being an attorney of the firm M/s Abdul Malik and Lawrence Tan and in such capacity entrusted with dominion over certain property, to wit, RM12.968.75, belonging to the clients of the said firm, committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under s. 409 of the Penal Code.

Second Charge (Amended):

> That you between 22 March 1987 and 22 June 1987 at the premises of M/s Abdul Malik and

Lawrence Tan, 24th Floor, UMBC Building, Jalan Sultan Sulaiman, in the Federal Territory of Kuala Lumpur, being entrusted with dominion o ver certain property, to wit, a cumulative sum of RM9,836, belonging to the employees of the firm M/s Abdul Malik and Lawrence Tan, committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under s. 406 of the Penal Code.

In the Court of trial, a *prima facie* case having been established by the prosecution in respect of both charges, the respondent was called upon to enter upon his defence and, at the close of the case for the defence, he was acquitted and discharged thereof on the ground, that as regards the first charge, he had raised a reasonable doubt on the question of dishonest intention and, as regards the second charge, that he had raised a reasonable doubt on the question whether he had dishonestly misappropriated or converted to his own use the money the subject matter thereof.

The Public Prosecutor being dissatisfied with that decision appealed to the High Court, which upheld the acquittals on substantially the same, if not the same grounds, as those advanced by the trial court, with the result that the appeal was dismissed. The Public Prosecutor then successfully applied to this Court under s. 66, Courts of Judicature Act 1964, for leave to refer for its determination, the following questions, which were said to be "questions of law of public interest, which had arisen in the course of the appeal and the determination of which by the High Court, had affected the event of the appeal":

l(a) Whether the element of "dishonesty" for the offence of criminal breach of trust under the Penal Code is in law proved when an Advocate and Solicitor takes a certain sum of money from the Clients' Account of the Firm for the use of the Firm, without authority of the client?

(b) If so, whether it would make any difference if the money was taken with the intention of replacing the sum taken as soon as the Firm was able to do so? and

(c) If "no", whether it would make any difference in Law if, at the time of taking the money from the Clients' Account, the Advocate and Solicitor had obtained the permission of a few clients to use their monies in the Clients' Account but the aggregate sum so authorised to be taken by those clients is less than the amount actually taken?

2. Whether it is criminal breach of trust under the Penal Code when an employer having deducted his employee's contribution to the Provident Fund in accordance with the Employees Provident Fund Act 1951, fails to remit the same to the Fund and such failure is due to the Firm not having the money to do so, it having used the money?

At the hearing before us, we had, following the majority decision in *Yue Sang Cheong Sdn. Bhd. v. Public Prosecutor* [1973] 2 MLJ 77, treated the hearing of this Reference as entitling us to review the entire evidence, so that we were in no way limited to just answering the questions arising therein. In other words, the Reference was treated as a re-hearing of the appeal before the High Court.

Accordingly, before us, the whole of the material evidence had been carefully and critically examined by the learned Deputy Public Prosecutor and it is unnecessary for us to discuss it again. It will suffice if we say that the basis of the orders of acquittal and discharge which had beeri recorded by the trial Court and the basis of the order of the High Court dismissing the Public Prosecutor's appeal therefrom, was as we have already observed, substantially speaking, the same if not precisely the same.

Consequently, the conclusions ofboth the Courts below revolved around issues of fact depending on the credibility of the respondent, and as to which there were concurrent findings of fact in his favour.

With respect, therefore, we do not consider that the questions posed by this reference are questions of law within the meaning of s. 66(1) of the Courts of Judicature Act in that they were not questions of law of public interest which had arisen in the course of the appeal and the determination of which had affected the event of the appeal.

In principle, therefore, we must decline to answer the questions posed by this Reference on the ground that we have no jurisdiction to do so and allow the orders of acquittal and discharge to stand.

But, if contrary to our view, the questions posed by this Reference are questions of law within the meaning of s. 66(1) and therefore it is necessary for us to answer them, then we would do so as follows:

Question 1 (a):

"Yes" or "No" depending on the particular circumstances of each case, including the explanation of the Accused and, whether or not, it is accepted.

Question 1 (b):

If, upon the facts of a particular case, the answer to Question 1 (a) is in the affirmative, so that the essential elements of the offence of criminal breach of trust have been made out, the fact that at the time of the commission of the offence the Accused had intended to make restitution, as soon as possible, could not in Law constitute a defence, because even temporary misappropriation or conversion of money, or dishonest use or disposal of it in violation of any direction of law or of any legal contract express or implied or wilfully suffering any other person so to do, would amount to criminal breach of trust within the meaning of s. 405 of the Penal Code.

We would answer Question l(b) accordingly.

Question 1 (c):

This question does not arise in view of our answer to Question 1 (b).

Question 2:

In order to determine this question it is necessary, first of all, to keep in the forefront of our minds the actual words of s. 405 of the Penal Code; they are as follows:

> 405. Whoever, being in any manner entrusted withproperty, or withany dominion over property dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'.

Clearly, under s. 405, the very first ingredient which the prosecution must prove is that the Accused was either entrusted with the property the subject of the charge or was entrusted with dominion over that property. In the case of entrustment of dominion over that property, the mere existence of that person's dominion over property is not enough. The prosecution must go further and show beyond reasonable doubt that his dominion was the result of entrustment or, in other words, that the term "entrustment" in s. 405 governs not only the words "with the property" immediately following it but also the words "or with any dominion over the property" occurring thereafter. [See *Velji Raghavji Patel v. State of Maharashtra AIR* [1965] SC 1433].

As for entrustment, in India, the position prior to 1 November, 1973 was that there was considerable judicial controversy as to whether the failure of an employer to remit to Provident Fund the sum deducted from the employee's wages as employee's contribution could or could not constitute an offence under s. 405 of the Penal Code. (See the cases referred to at p. 3498, in Sir Hari Singh Gour's **Penal Law of India**, 10th Edn.).

However, with effect from lNovember, 1973 the controversy had been laid to rest by reason of the addition of Explanation 1 to s. 405 of the Indian Penal Code by the Amending Act 40 of 1973 which reads:

> Explanation 1 - A person, being an employer, who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

The effect of the addition aforesaid (which has no equivalent in our Penal Code) is that the failure of an employer to remit to Provident Fund the sum deducted from his employee's wages may amount to an offence under s. 405.

In our view, for purposes of s. 405 of our Penal Code, there must be an actual and not just a fictional entrustment. This is because the expression "entrustment" implies that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner. [See *State of Gujarat v. Jaswantlal AIR* [1968] SC 700 at 701].

In amplification of this point, we would add that, a in the case of an employee within the meaning of the Employees Provident Fund Act 1951, who is obliged to make his contribution to the Employees' Provident Fund, the employer is under a duty to deduct the contribution of such an employee from his wages. It follows that once this deduction is made such an employee can exercise no control over the sum of money thus deducted nor can he exercise any rights of ownership over the same simply because he no longer is the owner of the same.

Accordingly, we hold that the deduction by an employer from the wages of the employee pursuant to the provisions of the Employees' Provident Fund Act, does not amount to entrustment under s. 405 of the Penal Code. [See *Nathmull Poddar v. Salil Kumar Chakraborty* [1971] Cr. LJ 361 (Calcutta), *Ahmed Ramlan v. Smt. Gertie Mathias* [1977] Cr. LJ 309, 310 (Kamataka)].

Accordingly, we would answer Question 2 in the negative.

But, if contrary to our primary view, in the circumstances posed by the question, entrustment is made out, whether or not the offence of criminal breach of trust has been committed would depend upon the particular circumstances of each case, including the explanation of the Accused, and whether or not it is accepted.

As to the merits of the Reference, it is not the practice of this Court to review the concurrent findings of fact by the Courts below and, in any event, we are not persuaded that on the application of the law as to criminal breach of trust, as defined in s. 405 of the Penal Code, to the facts, both those Courts were not entitled to arrive at the conclusion that the respondent had succeeded in raising a reasonable doubt as to the truth of the case for the prosecution or as to his guilt, in respect of both the charges.

We need hardly add that as an Appellate Court, and particularly, as a Final Appellate Court, we do not sit here to retry a case. The fact, therefore, that we or other Judges, trying the case might have arrived at a different conclusion, is beside the point.

In the result, we would affirm the orders of acquittal and discharge recorded in favour of the respondent.